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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 10-0162

FREDERICK HARMON AND
MADELENA HARMON,

Plaintiffs and Appellees,

vs.

FISCUS REALTY, INC.,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of the Thirteenth
Judicial District of the State of Montana, In and
for the County of Yellowstone
Civil No. DV 08-0946
Judge Russell C. Fagg Presiding

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I.**STATEMENT OF ISSUES**

Did the District Court error by denying Appellant, Fiscus Realty, Inc.'s request for attorney fees as the prevailing party pursuant to the Montana Unfair Trade Practices and Consumer Protection Act, wherein Plaintiffs' case was frivolous, unreasonable and without foundation against Fiscus Realty, Inc.

II.**STATEMENT OF THE CASE**

On March 26, 2006, in a "for sale by owner" deal, Madelena Harmon signed a purchase agreement with Jerry Burright d/b/a Bison Better Built to have a family home built. The home deal closed on July 3, 2006 wherein Plaintiffs/Appellees (hereinafter Harmons) purchased a new, and un-lived in condition home where state and federal inspections had been completed during the construction process. The final FHA Home Inspection took place on July 1, 2006 two days prior to the closing. At closing, the builder provided the Harmons with a one (1) year new home warranty as required by FHA.

Over the next two years the Harmons requested Jerry Burright to repair home defects and deficiencies that were revealed after the Harmons moved into the home. The requests turned into disagreements which resulted in this lawsuit.

On July 2, 2008, twenty four months after the Harmons closed on the purchase of their home, a lawsuit was filed against the builder, Jerry Burright, d/b/a Bison Better Built, Dianne Burright, individually and as agent and/or employee (hereinafter Burrights), and Fiscus Realty, Inc., employer and principal. Fiscus Realty Inc. (hereinafter Fiscus Realty) was joined as a defendant based upon the following legal contentions:

- I. Negligence and Negligence *Per Se*.
- II. Negligence and Misrepresentation.
- III. Violation of Montana Unfair Trade Practices and Consumer Protection Act.
- IV. Violation of Montana Real Estate Licensing Act.
- V. Breach of Expressed or Implied Warranty.
- VI. Constructive Fraud.

Paragraph 45 of the amended complaint contended that Fiscus Realty was liable for the conduct of Dianne Burright based upon a theory of Ostensible Agency.

Prior to trial, over an eighteen (18) month period, Fiscus Realty requested by five (5) motions to be released as a non party in the Harmons/Burrights "for sale by owner" dispute over new home warranty defects. The District Court denied each motion.

The case was tried before a jury in Yellowstone County. On December 9, 2009, after six and a half (6 ½) days of trial, the jury was presented with a special verdict form drafted by Judge Russell C. Fagg. The District Court's special verdict form eliminated all of the theories against Fiscus Realty, except one:

"Did defendant Fiscus Realty, Inc., violate Montana's Real Estate Licensing Act which was a cause of plaintiffs' damages?"

To the lone allegation, the response by the jury was "no." Following the jury verdict, Fiscus Realty asked the District Court to assess attorney fees as the prevailing party pursuant to the Montana Unfair Trade Practices and Consumer Protection Act.

Judgment was entered by Judge Russell C. Fagg, wherein the Court stated "the jury determined that Defendant Fiscus Realty, Inc., was not liable for any

claims asserted by Plaintiffs.” The judgment reserved the decision on the post trial motions including Fiscus Realty’s request for assessment of attorney fees. The District Court issued its order on January 8, 2010 denying Fiscus Realty’s motion for assessment of attorney fees.

An amended judgment and a notice of entry of amended judgment were entered on January 19, 2010. Fiscus Realty filed its Rule 59(g) M.R.Civ.P. post judgment motion to reconsider the denial of attorney fees on January 25, 2010. Judge Russell C. Fagg issued his order and decision denying the Rule 59(g) M.R.Civ.P. motion to reconsider on March 3, 2010.

Upon the denial of the Rule 59(g) M.R.Civ.P. motion, Fiscus Realty appealed the decision of the District Court on April 1, 2010.

III.

SUMMARY OF ARGUMENT

The District Court, in its last denial of Fiscus Realty’s request for attorney fees stated if Clayton Fiscus was not happy with the denial he could appeal it to the Montana Supreme Court. To this end, Fiscus Realty is now asking the Supreme Court for relief.

The controlling law of Montana is set forth by this Court in *Tripp vs. Jeld-wen, Inc.*, 327 Mont. 146, 112 P.3d 1018 (2005). Pursuant to the Supreme Court’s direction, the District Court has the discretion to award attorney fees to a prevailing party under the Montana Unfair Trade Practices and Consumer Protection Act (hereinafter Consumer Protection Act). Fiscus Realty contends that the District Court abused its discretion in failing to assess attorney fees to the prevailing party in the underlying cause of action.

Real Estate Licensing Act - Invalid in For Sale By Owner Transaction:

Fiscus Realty acknowledges that in order to be successful in the appeal, it

must provide evidence that the Court abused its discretion in failing to award attorney fees. The abuse of discretion occurred wherein the District Court failed to recognize the case against Fiscus Realty was frivolous, unreasonable or without foundation in a “for sale by owner” transaction against Fiscus Realty. From Fiscus Realty’s first motion for summary judgment to the denial of the Fiscus Realty’s motion for directed verdict, the District Court, and all parties involved in the litigation, knew that the real estate transaction was a “for sale by owner” transaction and Fiscus Realty could not be a party in the deal without a written listing agreement. By definition, the Montana Real Estate Licensing Act did not apply. Therefore, no basis existed for Fiscus Realty to be included in the lawsuit.

District Court May Award Attorney Fees:

Pursuant to the Consumer Protection Act, the District Court may award attorney fees to the defendant where there is a finding that the Plaintiff’s case was frivolous, unreasonable, or without foundation. Fiscus Realty contends that the District Court ignored affidavits, closing documents, MCA statutes, Fiscus Realty’s testimony at trial, and the full weight of the trial when the District Court denied the motion for directed verdict. At the motion for directed verdict, The District Court advised the Harmons that their case was on a thin rope. The Court stated that the motion would be reviewed if the jury did not find on behalf of Fiscus Realty. Based upon this statement, there can be only one conclusion, the District Court should have found that the case was frivolous, unreasonable or without foundation under the guidelines of the Montana Supreme Court as set forth in *Tripp vs. Jeld-wen, Inc., Id.* (2005). The District Court should have awarded attorney fees to the prevailing party.

Fiscus Realty Was Named in the Case as “Deep Pockets” Only:

From the very beginning of the case, the Harmons named Fiscus Realty

solely for its “deep pockets”. The District Court concurred with this observation with its dicta at the second summary judgment motion hearing. At trial, no witness testified that Fiscus Realty had any involvement in the defective home case. In fact, the Harmons said that Fiscus Realty was not involved in the warranty issues. Harmons testified that they did not know Fiscus Realty existed, nor that Fiscus Realty was being sued for monies.

Fiscus Realty Should Have Been Removed from Case:

The District Court erred at the first summary judgment hearing by failing to grant Fiscus Realty’s motion for summary judgment based up ostensible agency theory. The District Court erred for a second time when it failed to sever the trials involving two sets of defendants, to wit: Fiscus Realty and Jerry Burrigh, d/b/a Bison Better Built, and Dianna Burrigh. The fact that the case against the Burrighs was a builder warranty case versus the case against Fiscus Realty for violating the Montana Real Estate Licensing Act, and how Fiscus Realty could be a party in a deal without a listing agreement was brought to the District Court’s attention to no avail. The District Court erred for a third time when it denied Fiscus Realty’s second motion for summary judgment. The District Court concluded that Fiscus Realty had been solely brought into the case as a “deep pocket”.

The District Court erred for a fourth time in denying Fiscus Realty’s request to inspect the Harmon home. The District Court stated that the condition of the property had little to do with Fiscus Realty’s issue in the case, to wit, an agency issue. The District Court erred for a fifth time when the Court denied Fiscus Realty motion for a directed verdict. The District Court opined that the jury would find in Ficus Realty’s favor. If the jury did not, the Court would review Fiscus Realty’s motion for directed verdict.

Home Warranty Case - Fiscus Realty Not A Party:

The trial lasted for 6 ½ days. During that time, the Harmons presented 19 witnesses directed to the issue of a home warranty. The Harmons presented no witnesses as to violation of the Montana Real Estate Licensing Act. Of significance, both Harmons testified that Fiscus Realty had nothing to do with their warranty case. The builder, Jerry Burrigh, testified that Fiscus Realty was not a party in the transaction in any way. The cumulative effect of refusing to remove Fiscus Realty from the case, the complete absence of any evidence directed or raised against Fiscus Realty and the admissions by the Harmons, that Fiscus Realty had nothing to do with the warranty issues, form the basis for Fiscus Realty contending that there was an abuse of discretion by the District Court in failing to award attorney fees in a frivolous case.

IV.

STATEMENT OF FACTS

A) The Montana Real Estate Licensing Act - For Sale By Owner:

Fiscus Realty was forced to defend itself based upon the shot gun approach used by the Harmons in Cause No. DV08-0946. App. Doc #1 page 1¹. From the beginning of the case, the Harmons were advised and warned by Fiscus Realty that the Montana Real Estate Licensing Act did not apply to the case at hand. (App. Doc # 2 pg #13). At this juncture of the litigation, Fiscus Realty argued "Fiscus Realty was not a party to the transaction." As part of the argument to Judge Fagg, the affidavits of Jerry Burrigh and Dianne Burrigh were attached establishing that fact. The transaction involved a sale by owner. All evidence established that the home was built, owned, and sold by the individual Jerry Burrigh. Fiscus

¹ citation to the documents in Appellant's appendix shall as be follows:
App. Doc # ____ pg # ____.

Realty was not a party in the deal.

i) Legal Owner of Property:

Jerry Burright was the legal owner of 1719 Rosecrans Drive (TT pg 949, lines 2-12²); (Testimony of Madelena Harmon). Fred Harmon was aware of who owned the house to wit, Jerry Burright (TT pg 66, lines 25-26, pg 67 lines 1-10). Mr. Burright establishes that he was the sole owner as follows:

“Q. Mr. Burright, in regard to the ownership of this property that we’ve been talking about; are you the sole owner? Or were you the sole owner?

A. Yes I am.

Q. Was your wife sitting over there, ever listed on the title or the owner of the property?

A. No she was not.

Q. As the owner of the property, did you at any time enter into a listing agreement with Fiscus Realty, Inc.?

A. No.”

TT pg 470, lines 20-27; pg 471 line 1

The transaction was clearly a “for sale by owner”

“Q. And in regards to the whole transaction between yourself and the Plaintiffs sitting right there, was this a for sale by owner transaction?

A. Yes, it was.

Q. And did you have any involvement with the realty company?

A. No.”

TT pg 471, lines 13-18

ii) No Commissions Paid to Fiscus Realty:

Debra Malvey, is the manager for the real estate department at Yellowstone Bank (TT page 359 lines 2-10). Debra Malvey found no closing statement wherein Fiscus Realty was paid a commission on the sale of the Rosecrans home (TT pg 385, lines 22-27). Jerry Burright also stated that no commission was paid.

“Q. And did you have any involvement with the realty company?

A. No.

Q. For example, did you pay any money to Fiscus Realty, Inc.?

A. No, I didn’t.

² Citation to the trial transcript shall be as follows: TT page number - pg, line _____

Q. No commissions?

A. No, it's for sale by owner, you don't pay commissions to the realtor. They're not even involved in the whole thing.

Q. Was Clayton Fiscus ever involved at any time with going to the house to inspect it?

A. No.

Q. At any closing matters at Chicago Title?

A. No, he was never there."

(TT pg 471, lines 17-27)

By statute the Montana Real Estate Licensing Act does not apply to a "for sale by owner" The controlling law is found at §37-51-309, subsections (4), MCA (App. Doc #4 pg # 45). By this statute, the District Court was aware of the Montana Real Estate Licensing Act and the fact that the Act does not apply to a "for sale by owner" transaction. (App. Doc 2 pg # 20 line 5; App. Doc 4 pg 45).

iii) Home Warranty Case:

The argument of Burrights' counsel at the second summary judgment hearing summarizes the true scope of the case. Cal Stacey stated as follows:

"And so at the time of trial, it seems to me, your Honor this is a house defect case. It's a house case where the evidence will be whether the house was built properly or not built properly "

(App. Doc 7 pg # 188 lines 11-13).

The transcript of the proceedings establish that the Harmons called nineteen (19) witnesses pertaining to the warranty issues. (Index to trial transcript). Clayton Fiscus was not called to the stand by the Plaintiffs (Index to trial transcript) concerning the warranty issues. Madalena Harmon testified Fiscus Realty was not involved with warranty issues. (TT pg 958, line 9-19).

Fred Harmon testified that Fiscus Realty was not responsible for home warranty defects. (TT pg 144 line 7-23). Fred Harmon testified that Clayton Fiscus was not contacted by his counsel until twenty four months after the buy-

sell. (TT pg 130 lines 25-27; pg 131 lines 1-7). Fred Harmon admitted that Fiscus Realty was not on the buy-sell agreement (TT pg 131 lines 8-27; pg 132 line 1). Harmon did not know Fiscus Realty existed (TT pg 133 lines 3-9).

iv) Separate Trials:

Fiscus Realty attempted to focus the District Court on the joining of Fiscus Realty to a defective workmanship and home warranty case by filing a motion for separate trials on July 7, 2009. (App Doc 5 pg 47). Fiscus Realty filed its memorandum in support of its motion to separate trials. The District Court was again presented with statutory language of §37-51-309, (4)(b), MCA. Per statute, no duties are imposed upon the broker until there is a written listing. See §37-51-314(1), (6) MCA. The statute clearly states that a broker is not responsible or liable for the personal transactions of the salesperson. (App. Doc 4 pg 45-46). As part of the argument to the District Court, an affidavit of Clayton Fiscus was included to emphasize how distinct and separate the two cases were. The Court was presented with the argument that §37-51-309, (4)(b) and §37-51-314, (1), (2)(a) MCA, sets forth the controlling statutory language, when a property is listed, as it pertained to the issue of Fiscus Realty. Fiscus Realty had no reason to be called into the fight between a homeowner and homebuilder as to warranty issues. (App. Doc 5 pg 128-129). In said affidavit, Clayton Fiscus stated as follows:

- “1. Fiscus Realty, Inc. (hereinafter “Fiscus”) was not the owner or builder of the home identified as 1719 Rosecrans;
2. Fiscus did not build or contract to build the new home. Complaints argued against the construction quality would prejudice Fiscus defense;
3. Fiscus had no part in the builders house plans. Fiscus defense would be prejudiced over arguments of how the plans were changed and followed;
4. Fiscus did not have the property listed, therefore, Fiscus could not trespass on the property. All parties who had duties and actions that were authorized to go on the property could not be witnessed and defended against by Fiscus. Again prejudicing the right to defense

against charges here”.

B) Multiple Attempts To Remove Fiscus Realty:

(i) Motions for Summary Judgment:

The District Court erred in denying Fiscus Realty’s first and second motion for summary judgment. In the first motion for summary judgment, seven affidavits were submitted establishing that the transactions was a “for sale by owner”. The controlling statutes were submitted to establish that Fiscus Realty was not responsible nor liable for personal transactions. See §37-51-309(4)(a), (4)(b), and (5). The decision of Judge Fagg dated November 7, 2008 articulates the Court’s understanding of the transaction. “Further, Jerry Burrighr was the owner of the home the Harmons bought”. (App Doc 9 pg 207 line 2.)

The District Court erred in denying Fiscus Realty’s second motion for summary judgment. The Harmons and Fiscus Realty filed respective motions. In regard to Fiscus Realty’s motion, the Court was clear in its understanding that Dianne Burrighr was not the owner. Due to the filing of motions for summary judgment by both the Harmons and Fiscus Realty, a hearing was held on September 17, 2009. At that hearing, the District Court made several observations which are of significance to the appeal herein. (App Doc 7 pg 184, line 1-4).

Fiscus Realty and the Burrighrs argued to the District Court that the case was a warranty case and that there was no reason for Fiscus Realty to be in the case. (App Doc 7 pg 188 lines 9-27; pg 196 lines 26-27). Again the District Court was presented with Fiscus Realty’s argument that §37-51-309 controlled. Specifically subsections (4)(a), (4)(b) and (5) were raised. In addition, §37-51-314 applies when a property is listed but not in a for sale by owner transaction. Said statutes establish that Fiscus Realty is not responsible nor liable for personal transactions.

ii) Deep Pockets:

The fact that Fiscus Realty was in the case only for deep pockets came to light wherein the Court stated:

“ Well, you know, and I know, what it has to do with is who is going to pay, that’s what this whole case is about”.

“C. Stacey - Ultimately - the real estate, the broker”.

“The Court - yeah, whether Mr. Fiscus, his insurance is on the hook for this, that’s what this whole thing is about”.

“C. Stacey - and that’s not in the record, your Honor, and that’s what you, as a Judge, would assume and 99 out of 100 times, your assumption would be absolutely correct”.

“The Court - Okay well, you telling me there’s no insurance doesn’t matter. He’s the deep pocket”.

“C. Stacey - Right. Well, I’m just going to say, there is insurance from my clients, that’s how I got involved in this case. So it - maybe when the case was first filed, the deep pocket was the idea, but that has all changed”..... (App Doc 7 pg 191 lines 5-17).

The District Court summed up the belief as to this case wherein the Court stated that:

“... I really do trust the jury system and to have twelve people decide this case - and to be honest, my guess is they’re going to say Fiscus Realty doesn’t have any responsibility here. That’s my guess. But it doesn’t mean I’m going to grant summary judgment on that”. (App Doc 7 page 198 line 5-6 and 18-20).

The District Court recognized that the Harmons were on thin ice in their claims against Fiscus Realty. The District Court recognized that the reason Fiscus Realty was a defendant in the case was for its deep pockets.

C) Fiscus Realty’s Inspection of the Property:

Fiscus Realty’s motion for inspection of property was filed on October 22, 2009. On November 10, 2009, the Court denied Fiscus Realty’s motion for inspection of property. The order denying the inspection continues the steps in arriving at Fiscus Realty’s conclusion that the District Court abused its discretion in not awarding attorney fees. The District Court clearly separated Fiscus Realty from the warranty case when it stated:

“the Court is also cognizant that the condition of the property really has very little to do with Defendant Fiscus Realty’s issue in the case, which is more the agency issue.”

(App Doc 8 pg 205 line 22-23).

D) Directed Verdict for Fiscus Realty:

Fiscus Realty moved for a directed verdict based upon the lack of any evidence being presented. The Court stated that it would rather have a jury dismiss Fiscus Realty so there would be no appeal. The District Court erred by not granting Fiscus Realty’s motion for directed verdict. The Court again advised the Harmons that they were on thin ice. The discussion was as follows:

“Court: ... I am not going to grant the motion for directed verdict, however, if there happens to be a verdict against Fiscus, then I’ll revisit that issue, because I think it’s a pretty thin rope that the Plaintiffs are hanging their hat on, but I think it’s good enough to get them by a directed verdict, but I’m not so sure after that. So that’s what we’ll do.

J. West: But your Honor, if I may? What I’m raising to you is not a question of fact-type approach, it’s that’s a black letter law saying that she has got to own the property to be doing a personal transaction. And if she’s not falling within the regulation, then how can the corporation be here, and I believe this is a question of law, and that’s why it’s appropriate for you to make the decision, and just what you said, it’s so thin, so as a question of law, I would ask you to reconsider what you’ve just said and grant the dismissal, because it’s not - it’s black letter law, she didn’t own the property, she can’t do anything here other than act as a wife, which she did.

Court: Well to be completely honest, I believe the jury will find that Fiscus Realty does not have any responsibility in this case, and if they do that then that is an issued that doesn’t have to go up on appeal. If I grant directed verdict, then that is an issue that can go up on appeal, and so I think it’s prudent to the let the jury do their thing and if they do find negligence, we’ll revisit the issue...”

(TT pg 969 lines 22-27; pg 970 lines 1-16)

E) Testimony by the Harmons:

Next, the conduct of the trial by the Harmons provided the basis for

awarding Fiscus Realty its attorney fees. The trial lasted six and a half (6 ½) days. During that time, the Harmons did not call any witness to refute the fact that the transaction was a “for sale by owner.” Plaintiff/Appellee, Madelena Harmon testified that she did not expect Fiscus Realty to warranty the property, pound nails. (TT pg 951 lines5-18; pg 958 lines 8-13) . The Plaintiff/Appellee, Frederick Harmon did not expect Fiscus Realty to warranty the property. (TT pg 144 lines2-22).

Fiscus Realty, by and through its owner, Clayton Fiscus, presented its own defense following the Court’s denial of Fiscus Realty’s motion for directed verdict.

F) Jury Trial - Testimony of Clayton Fiscus:

i) Deep Pockets:

Clayton Fiscus took the stand in his defense. When questioned as to why he was brought in to a courtroom and had to sit through a 6 ½ days of trial, his answer was:

“A. My wallet. That’s what they want, is money. All about money”. (TT pg 1097 line 5-9).

Clayton Fiscus did not receive notice of the matter until 24 months after the closing.

“A. I got notice about 24 months after, after the, um, deal closed. It was actually about 22 months I got my first notice, and then I got knowledge of it 24 months through a lawsuit.

Q. Twenty-two month you got an attorney call you up and asking -

A. First notice.

Q. He wanted money”.

(TT pg 1097, lines 18-24)

Clayton Fiscus stated that no listing agreement existed between Fiscus Realty and the Plaintiffs. (TT pg 1098, lines 15-27). Without a listing agreement, Clayton Fiscus stated that he could not receive payment. (TT pg 1100, lines 3-7)

ii) Ostensible Agency:

Clayton Fiscus addressed the issue of Ostensible Agency since the matter was raised in the lawsuit

“ Q. Well, then I come back to my question that I’ve been starting with, why are you standing up there; if you have no listing agreement, you got no money out of this thing, except for seven days of sitting in that hard chair. You know that you’ve been under the legal theory, they say that you’re, there’s an ostensible agency that made you sit here. You’re aware of that, are you not?

* * *

Q. Obviously in this case, since there is no listing agreement, that form wasn’t filled out, correct?

A. It can’t be formed out because in the statute it clearly states, it say, it must be listed and then immediately thereafter you sign a listing agreement with a seller, that’s the first one, and then all subsequent agencies start thereafter.

Q. So-okay, without the first document as you referenced, but, again, let me go back to why you’ve been sitting through this - at this table. You understand, do you not, that the Plaintiffs are saying based upon ostensible agency, you’re responsible for what the other defendants did in this case , is that correct?

A. That’s what they want.

Q. What do you understand is the ostensible agency? What is it?

(TT pg 1100, lines 24-27; pg 1101 and 1102 lines 1-9)

The testimony of Clayton Fiscus was clear that all relationships require a listing agreement. In the case at hand, there was no listing agreement between the Burrights/Bison Better Built and Fiscus Realty. (TT pg 1113-1115)

G) Motion for Assessment of Attorney Fees:

Following the jury’s decisions, Fiscus Realty filed its motion for assessment of attorney fees as the prevailing party and a memorandum in support thereof. The argument of Fiscus Realty was that Fiscus Realty was the prevailing party. That the

Harmons action was frivolous, unreasonable, and without foundation. (App Doc 10 pg 215-217). In support of said motion, the affidavit of Clayton Fiscus was presented, including Exhibits with attachments. (App Doc 10 pg 219).

The District Court denied said motion. (App Doc 11 pg 227) The District Court stated as follows:

“In this case, there was a conjunction of and interplay between three non-stranger relationships - the erstwhile friendship between Madelana and Dianne, the standing agency relationship between Dianne and Fiscus, and the marriage between the person who built Plaintiffs’ house and the person who sold it. Given the non-stranger relationships, the disputed facts surrounding them, and the undisputed problems with Plaintiffs’ home, the Court does not believe Plaintiffs’ unfair trade practices claims were so unreasonable, unfounded, or frivolous that attorney fees should be awarded. In addition, the Court agrees with Plaintiff that Montana law would err on the side of allowing would-be plaintiffs to bring claims in the consumer protection area. The issue of attorney fees was a close and difficult one for the Court to decide, especially with respect to Defendant Fiscus Realty. Nevertheless, the Court will deny both the Burrights and Fiscus Realty an award for attorney fees”.

(App Doc 11 page 227 line 5-14)

Following the denial of attorney fees, Fiscus Realty filed its Rule 59(g) motion for reconsideration. The affidavit of Clayton Fiscus was filed in support of said motion. (App Doc 12 page 231) Said affidavit clearly sets forth the summary of the case, to wit the Harmons failed to prove any count alleged in their amended complaint against Fiscus Realty.

V.

STANDARD OF REVIEW

The Montana Supreme Court has set forth that a prevailing party in a Consumer Protection Action may receive attorney fees. *Tripp vs. Jeld-wen, Inc.*, 327 Mont. 146, 112 P.3d 1018 (2005).

This Court has spoken to a general issue of abuse of discretion by the District

Court in *Kuhr v. City of Billings*, 2007 MT 201, ¶ 14, 338 Mont. 402, 168 P.3d 615. In *Kuhr*, the District Court abuses its discretion when it act arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice. *Kuhr*, ¶ 14.

The general standard of review of a District Court's conclusion is set forth in the case of *In Re the Marriage of Kovash*, (1995) 270 Mont. 517, 893 P.2d 860, 863. In *Kovash*, this Court said a District Court's conclusions of law will be reviewed to determine "whether the Court's interpretation of law was correct." *Kovash*, 893 P.2d at 863, citing *In Re The Marriage of Barnard* (1994) 264 Mont. 103, 870 P.2d 91.

The Supreme Court is not bound by the District Court's conclusions and remains free to make its own conclusions. *In Re The Marriage of Rock* (1993), 257 Mont. 476, 850 P.2d 296, 298.

VI.

ARGUMENT

Fiscus Realty asks this Court to find that the District Court abused its discretion in failing to assess attorney fees to the prevailing party under the Consumer Protection Act. The basis for awarding attorney fees was provided by this Court in the case of *Tripp vs. Jeld-wen, Inc. Id.* (2005). Based upon this Court's direction, the District Court may award attorney fees to the Defendant upon a finding that Plaintiff's actions were frivolous, unreasonable or without foundation.

In reviewing the dicta in the *Tripp* case, there are numerous similarities between the case at bar and *Tripp*. In *Tripp*, Defendant was successful against the Plaintiff's claims of unfair or deceptive trade practices under the Montana Consumer Protection Act. The Court concluded that:

"Therefore, we conclude that an award of attorney fees under the MCPA should be made under the same standard as that of the MHRA. When faced with a successful defendant, a district court should only award attorney fees 'upon a finding

that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith'." Tripp vs. Jeld-wen, Inc., 205 Mont. at 157.

A) SPECIAL VERDICT EXONERATED FISCUS REALTY INC.:

The facts of the case before the Court are clear. The Harmons, in their amended complaint, raised six (6) contentions against Fiscus Realty and included a seventh (7th) contention at paragraph 45 of the amended complaint. At the end of the case, the special verdict exonerated Fiscus Realty.

This Court's attention is directed to the special verdict. The jury found at question 8 that Diane Burright did not violate Montana's Real Estate Licensing Act and cause damage. Likewise, the jury found that Fiscus Realty, did not violate Montana's Real Estate Licensing Action and cause damage to the Harmons. Simply put, Clayton Fiscus, in representing the corporation, sat through six and a half days of trial. He was not called as a witness in Harmons' case in chief. Rather, he testified in the corporation's defense for approximately twenty five minutes during this whole ordeal. The jury unequivocally removed the corporation from the case. This Court, in reviewing the special verdict, will conclude that the only party that was found 100% innocent was Fiscus Realty.

Defendant Fiscus Realty contends that this case was frivolous, unreasonable and without foundation. The lawsuit was based solely upon the Harmons' desire to find a "deep pocket" to rob monies from. This Court is aware of the fact that Fiscus Realty, was not put on notice of any transaction with the Harmons until twenty four (24) months after the buy sell was entered into. The first contact was not to investigate facts, but to demand monies from the corporation. The Harmons were confronted with two separate summary judgment proceedings, a motion to separate trials, a motion to inspect the property over warranty claims, and finally, a motion for directed verdict. At all times, the District Court commented to the Harmons that they were on a very thin

rope trying to connect the corporation into their causes of action. Nevertheless, the Harmons continued their attempts to create a cause of action against the corporation in order to get into the corporation's pockets. Clayton Fiscus clearly articulated the facts of the case pertaining to the real estate matters. There was no signed listing agreement. Fiscus Realty could not go onto the property; could not place a lock box on the door of the property; could not advertise the property. A simple investigation of these facts by the Harmons would have led a reasonable person to conclude that the corporation was not involved. Fiscus Realty was not a party in the deal. The Harmons ignored the evidence and frivolously, without foundation pursued Fiscus Realty. For eighteen months, Fiscus Realty had to defend itself by paying attorney fees. The Harmons were placed upon notice of Fiscus Realty's defense from the inception of the litigation. Again, this Court must note that the lawsuit was filed two years after the closing of the house. At the time of trial, the Harmons failed to call Clayton Fiscus to the stand. The simple reason that no witnesses were called during Harmons case in chief against Fiscus Realty, nor was Clayton Fiscus called to the stand is that the Harmons at all times knew that they had a frivolous lawsuit which was unreasonable and without foundation.

Based upon the decisive jury decision, Plaintiffs' lawsuit was frivolous, unreasonable and without foundation. The transaction was a "for sale by owner". Plaintiffs knew or should have known that there was no connection with Fiscus Realty. The frivolous portion of the case was established by the fact that at trial Plaintiffs never attempted to prove any of the contentions found in the first amended complaint directly against Fiscus Realty. After eighteen (18) months of discovery and pre-trial actions, and then following a six and a half (6 ½) day jury trial, the summary of the contentions in the complaint accuse Fiscus Realty of the following:

ContentionTrial Evidence Against Fiscus Realty

- | | |
|---|---------------------------------|
| 1. Negligence and Negligence Per Se | No evidence presented at trial. |
| 2. Negligence and misrepresentation | No evidence presented at trial. |
| 3. Violation of Montana Unfair trade Practices and consumer act | No evidence presented at trial. |
| 4. Violation of Montana Real Estate Licensing Act | No evidence presented at trial. |
| 5. Ostensible Agency claim | No evidence presented at trial. |
| 6. Breach of expressed or implied warranty | No evidence presented at trial. |
| 7. Ostensible agency | No evidence presented at trial. |

This Court must direct its attention to the special verdict form prepared by Judge Fagg. Judge Fagg, after hearing Fiscus Realty's motion for dismissal and directed verdict at the close of the Plaintiffs' case, prepared the special verdict form. On the Court's own volition all contentions were dismissed except for one question regarding a violation of the Montana Real Estate Licensing Act. Fiscus Realty contends that the fact the Court dropped six out of seven claims establishes the frivolous and unreasonable nature of this case. In focusing on Fiscus Realty's contentions, the trial testimony supports this contention. None of the allegations nor claims were ever presented by the Plaintiffs' to the jury. Fiscus Realty was ignored completely throughout the trial. Testimony establishes that Fiscus Realty was a non-party in dealing with the Plaintiffs in that there was no written listing with the owner of the property, there was no commission paid to Fiscus Realty. Fiscus Realty was not even called to the stand in Plaintiffs' case in chief.

During the trial, Plaintiffs admitted and testified that Fiscus Realty was not a party in their home warranty defects lawsuit against the builder. The Harmons admitted that they did not know that Fiscus Realty was being sued or even being involved in this matter.

In the eighteen months leading up to the trial, Plaintiffs' contended that Fiscus Realty failed to train and supervise Dianne Burright. Plaintiffs at all times knew that this was a "for sale by owner" deal. The District Court's attention was directed to § 37-51-309 (4)(a); (4)(b) MCA. This statute was brought to the Court's attention at each pretrial hearing including two motions for summary judgment and a motion to separate trial. The transaction was a contract for a "for sale by owner" wherein the Harmons and the builder, Jerry Burright were the only parties on the contract and all closing documents presented.

B) Deep Pockets:

Defendant Fiscus Realty contends that this case was frivolous, unreasonable and without foundation. The lawsuit was based solely upon the Harmons' desire to find a "deep pocket" to rob monies from. This Court is aware of the fact that Fiscus Realty, was not put on notice of any transaction with Madeline Harmon until twenty four (24) months after the deal closed. Prior to the lawsuit, the first contact was not to investigate facts, but to demand monies from the corporation. The Harmons were confronted with two separate summary judgment proceedings, a motion to separate trials, a motion to inspect, and finally, a motion for directed verdict. All motions were denied. At all times, the District Court commented to the Harmons' attorney and the Harmons that they were on a very thin rope trying to connect the corporation into their causes of action. Nevertheless, the Harmons continued their attempts to create a cause of action against the corporation in order to get into the corporation's pockets. Clayton Fiscus clearly articulated the facts of the case pertaining to the real estate matters.

There was no signed listing agreement as required in the Montana licensing law. See §37-51-314 (1), (2)(a), (6) MCA. Fiscus Realty could not go onto the property; could not place a lock box on the door of the property; could not advertise the property. A simple investigation of these facts by the Harmons would have led a reasonable person to conclude that the corporation was not involved. The Harmons ignored the evidence and frivolously and without foundation pursued Fiscus Realty. For eighteen months, Fiscus Realty had to defend itself by paying attorney fees. The Harmons were placed upon notice of Fiscus Realty's defense from the inception of the litigation. Again, this Court must note that the lawsuit was filed two years after the closing of the house. At the time of trial, the Harmons failed to call Clayton Fiscus to the stand. The simple reason that no witnesses were called during Harmons case in chief against Fiscus Realty, nor was Clayton Fiscus called to the stand is that the Harmons at all times knew that they had a frivolous lawsuit which was unreasonable and without foundation.

The frustration of Fiscus Realty in this case centered upon the fact that this was a home warranty case against the builder. Fiscus Realty was involved only for its deep pockets as previously stated. The Harmons opposed every summary judgment motion filed by Fiscus Realty stating that the jury must resolve the issue of the home defect complaints. After nineteen (19) witnesses at trial, a reasonable person would expect some evidence against Fiscus Realty. There was no evidence. Harmons knew or should have known that the real estate law covers broker's transactions with listing agreements and commissions. The broker is not a party in a "for sale by owner" transaction. Harmons case was over a home warranty issues as set forth in § 70-19-426 MCA in a transaction which was a "for sale by owner".

Harmons knew or should have known that to involve Fiscus Realty, agreements had to be in writing. There has to be a listing agreement with commissions and terms for the sale of the real estate (§37-51-314, MCA). The facts of this case establish that

there is no listing agreement between Jerry Burright and Bison Better Built with Fiscus Realty. The District Court itself commented that there was no commission paid and that the Harmons knew this fact. Fiscus Realty contends that this case was frivolous, unreasonable and without foundation in that the Harmons received the warranty deed at the closing of the their home with Yellowstone Bank. The warranty deed clearly established that the owner of the property was Jerry Burright. With this knowledge in hand, and nearly twenty four (24) months before the lawsuit was against Fiscus Realty, only one conclusion can be reached. This lawsuit was frivolous, unreasonable and without foundation based upon the law. The Harmons merely were looking for a deep pocket.

C) Home Warranty Case:

Fiscus Realty, again emphasizes to this Court, how frivolous, unreasonable and without foundation this lawsuit was since this case was a home warranty defect case between the Harmons and the Burrights. Fiscus Realty could not be a party to the home warranty defects since it was not the builder of the home, the owner of the home or in anyway connected. All facts were conclusive as to these contentions. As pointed out, Harmons testified that Fiscus Realty was not party in their warranty lawsuit. How much evidence is necessary to convince the District Court that this was a frivolous, unreasonable and without foundation lawsuit when the Harmons at trial admit that Fiscus Realty was not a party. The trial testimony clearly establishes Harmons looked to the builder, Jerry Burright and Bison Better Built for the new home warranty work. Madelena Harmon was asked whether she expected Fiscus Realty to pound nails on the roof she claimed was defective. She said no. the District Court heard the Harmons testify that they had no knowledge of their attorney sending a letter to Fiscus Realty and demanding money from Fiscus Realty or simply that Fiscus Realty existed. It is outrageous that Fiscus Realty was held a hostage in this lawsuit for over eighteen (18)

months and was required to sit through six and a half (6 ½) days of trial. This is the basis for a frivolous, unreasonable and without foundation lawsuit and the reason why the Consumer Protection Act does allow the assessment of attorney fees to the prevailing party. The fact here are clearly warrant the assessment of attorney fees in favor of Fiscus Realty against the Harmons.

D) District Court Erred:

In order to establish that the District Court abused its discretion in its decision to deny attorney fees to Fiscus Realty, the argument is made as to the numerous attempts presented.

In summary, the District Court erred in denying attorney fees to the prevailing party, Fiscus Realty, after watching the family corporation fight for eighteen (18) months to be removed from the frivolous lawsuit. The District Court watched Fiscus Realty sit for six and a half (6 ½) days of trial and not being called as a witness by the Harmons nor any evidence being directed to Fiscus Realty. The District Court watched nineteen (19) witnesses take the stand and testify as to a home warranty defect lawsuit. The District Court, as previously stated, went so far as to remove six (6) out of seven (7) contentions from the special verdict form. In response to the only contention, the jury entered a resounding rejection. Fiscus Realty did not violate the Montana Real Estate Licensing Act.

To establish an abuse of discretion, Fiscus Realty argues that when this reviewing Court looks at all of the issues which held Fiscus Realty in the law suit, only one conclusion can be reached. That conclusion is simply that this lawsuit was frivolous, unreasonable and without foundation lawsuit. The District Court should have awarded attorney fees to Fiscus Realty. In support of that conclusion the following is summarized:

1. First summary judgment hearing: Fiscus Realty was denied relief in this first attempt. Fiscus Realty argued that it was not a party to the transaction. The evidence and facts were provided though the affidavits submitted that the property was never listed with Fiscus Realty by the owner. The transaction was a "for sale by owner". Fiscus Realty had no notice nor knowledge of the transaction at the time it was ongoing. Fiscus Realty did not receive commission on the sale of the property. The argument presented was that Fiscus Realty could not be not be a party in this matter without a signed listing agreement with the owner. As proof of some involvement Fiscus Realty would have had to receive commission or had knowledge. Neither existed. The law of Montana was presented to the District Court showing that the Montana Real Estate Licencing Act covers listed property owners only and not "for sale by owners" transaction.

In addition, the Court was presented with the ostensible agency issue. The District Court erred in its opinion that Fiscus Realty could be liable to the Harmons though an ostensible agency theory or an implied ostensible agency theory. The evidence presented, by all parties, was clear that ostensible agency did not exist. There was a signed purchase agreement between the Harmons and the Burrights. This agreement was used to close the transaction. Those two parties had a right to do a "for sale by owner" transaction, to follow the Montana law which says that a contract must be in writing §28-2-903(1), MCA. Where the District Court erred is that it somehow continued to leave the non-party, Fiscus Realty, in the lawsuit.

2. Second summary judgment motion: The second summary judgment motion issue of deeps pockets was argued. Further salt was thrown in the wound at this second summary judgment hearing. The District Court clearly states that Fiscus Realty was involved in the lawsuit as a "deep pocket". There is no law in Montana based upon real estate law, licencing law, or any other theory that could be presented by the Harmons

that a deep pocket is a basis for liability.

A reasonable person must consider the dialogue that took place between Burrights' attorney, Cal Stacey, and the District Court at the second summary judgment hearing. The District Court was surprised to find out that the Burrights had insurance. The District Court was aware that Fiscus Realty had been named for its "deep pockets". This dialogue is indicative of the frivolous nature of this lawsuit against Ficus Realty. This dialogue presents the basis as to why the District Court should be reversed for failing to award attorney fees to Fiscus Realty.

3. Trial - The District Court erred when it refused to grant Fiscus Realty's motion for directed verdict. The District Court made it blatantly clear that the court expected the jury to relieve Fiscus Realty from the warranty case. The District Court stated that if there was an adverse decision the motion for directed verdict would be reviewed. This Court must find that based upon the dicta of the District Court, it was an abuse of discretion for the District Court by not awarding attorney fees to Fiscus Realty pursuant to the Consumer Protection Act.

Finally, Fiscus Realty's argument focuses upon the District Court dismissing six of the seven contentions of Harmons complaint by the special verdict form. The District Court dismissed the allegation of fraud, negligence, misrepresentation, breach of warranty, violation of the Montana Unfair Trade Practice Act, and ostensible agency. This Court's attention is brought to the fact that the District Court originally held Fiscus Realty in the ongoing litigation based upon ostensible agency. The District Court, on its own volition, removed six counts, including, the ostensible agency claim from the special verdict form. What stronger statement could be made that this lawsuit was frivolous, unreasonable and without foundation on that basis?

The only contention that the District Court sent to the jury was whether Fiscus Realty violated the Montana Real Estate Licensing Act and caused damages. The

Montana Real Estate Licensing Act in question does not apply in a "for sale by owner" transaction. The question sent by the District Court in fact did not fit the case. The District Court erred in not releasing Fiscus Realty and sending the matter to the jury. The lawsuit was over a new home warranty defects case. This case had nothing to do with Fiscus Realty. Since the Harmons raised the Montana Consumer Protection Act, the prevailing party should receive attorney fees. Fiscus Realty is the only party in this action that was the prevailing party.

4. The District Court acted without basis in its two orders denying attorney fees following the verdict and judgment entered: The jury verdict established that Fiscus Realty was the only prevailing party in this matter. The jury found Fiscus Realty completely without fault. The Harmons and the builder, Jerry Burrigh and Bison Better Built were both found liable in the home warranty lawsuit.

The District Court stated that the reason for denying attorney fees to Fiscus Realty was that there was a conjunction of an interplay between three non-stranger relationship, with friendship between Dianne Burrigh and Madelina Harmon; the agency relationship between Dianne Burrigh and Fiscus Realty; and the marriage between Jerry Burrigh, the person who built the home, and Dianne Burrigh, the person who sold the home. Fiscus Realty contends that this conclusion is an abuse of discretion by the District Court. The Supreme Court is not being asked to act as a trial court and retry the case. Rather, just to add up all of the times Fiscus Realty asked to be let out of the case because the law did not apply to Fiscus Realty as a broker. The law did not apply to Fiscus Realty in a "for sale by owner" deal. The Supreme Court will not be retrying the case by coming to the conclusion that there was never a basis for bringing Fiscus Realty into the lawsuit. The District Court, by applying the facts of the "for sale by owner" deal to the Montana Real Estate Licensing Act, could only reach one conclusion. Fiscus Realty could not be a party in the case.

With this conclusion, the District Court's "conjoined" reasoning is an abuse. The relationship has nothing to do with Montana law. The Supreme Court is asked to find that the District Court should have granted attorney fees to Fiscus Realty under this application of facts.

The District Court appears to have decided that there was a friendship relationship which somehow obliterated the legal facts. The law is clear that in order to have a broker liable, i.e., Fiscus Realty, there had to be a written listing agreement. This is the first requirement. Without that first requirement being met, there can be no obligation on Fiscus Realty's part as a broker. The moment the District Court realized that this was a "for sale by owner" transaction, that the property was always owned by Jerry Burright and there was no listing agreement, the District Court should have removed Fiscus Realty from the case. The District Court erred by not doing so. The error continued though out the whole case and still continued when attorney fees were not granted to Fiscus Realty. All of the multiple errors constituted an abuse of discretion on the District Court's part. The District Court's opinion that there was a friendship relationship is not relevant to the black letter law for licenced Realtors. The District Court, for whatever reason, has attempted to create some new legal requirement between Fiscus Realty as a licenced broker and the Harmons. The law does not allow this. Every conclusion made in this case has resulted in the final conclusion that this Court must reach. The District Court abused its discretion in not granting attorney fees to Fiscus Realty.

VII.

CONCLUSION

Harmons violated the Montana Unfair Trade Practices and Consumer Protection Act by filing a lawsuit that was frivolous, unreasonable and without foundation. The District Court erred in not awarding attorney fees to Fiscus Realty after it witnessed the

presentation of the lawsuit, the lack of evidence against Fiscus Realty and the admission made throughout the trial by the Harmons that this was a home warranty case. Fiscus Realty was not expected to pound nails to correct the building deficiencies. In summary, the frivolous, unreasonable case can be concluded as follows:

1. That the deal was a "for sale by owner" transaction;
2. Fiscus Realty had no listing agreement as required by §37-51-314 (1) and (2)(a), (6) MCA. Affidavits and trial testimony evidence went undisputed;
3. Fiscus Realty received no commission §37-51-102(4)(a) MCA. Affidavits and trial testimony evidence of this fact went undisputed.
4. Fiscus Realty did not build the home. This was undisputed from day one in the lawsuit.
5. Fiscus Realty did not provide a home warranty. §70-19-426 MCA. Affidavit and trial testimony evidence of this fact went undisputed.
6. The deal was closed with a written contract. The District Court's implied ostensible agency theory did not exist. In six and a half days of trial no evidence was produced.
7. Harmons admitted Fiscus Realty was not a party in the home warranty case against the builder.
8. Clayton Fiscus testified that the real estate office was not a party in the deal. This fact was undisputed with affidavits and trial testimony evidence.
9. The builder testified and gave an affidavit that Fiscus Realty was not a party in the transaction in any way.
10. Fiscus Realty was not a party in the jury trial. It was never called to the stand by the Harmons to face their claims.
11. The District Court dismissed Fiscus Realty of six allegations using a special

verdict form before giving the case to the jury. Dismissed in the complaint were the counts of fraud, misrepresentation, negligence, breach of warranty, violation of the Montana Unfair Trade Practices Act and ostensible agency theory.

12. The Court stated in the second summary judgment hearing that Fiscus Realty was needed in the lawsuit as a deep pocket. Deep pockets are not a basis for a lawsuit against a defendant.

13. Home warranty defects rest with the builder. Fiscus Realty was not a party in the home warranty litigation.

14. Harmons paraded nineteen witnesses in their home warranty and defect case. Fiscus Realty was not part of the warranty case.

15. Denial of fees to Fiscus Realty will open the door for frivolous lawsuits and claims against real estate licensees who cannot be a party to a "for sale by owner" transaction.

16. The District Court's opinion for denying fees found no support, reason nor foundation in MCA license law, trial evidence and testimony. The District Court's description of the interplay relationships had nothing to do with home warranty defects lawsuit and builders warranty work.

Based upon all of these facts, the District Court should have awarded attorney fees to the prevailing party - Fiscus Realty.

Dated this 22nd day of April 2011.


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Jock B. West

CERTIFICATE OF SERVICE


I hereby certify that on the 22nd day of April 2011, I mailed a true and correct copy of the above and foregoing **Appellant's Opening Brief**, via the United States Postal Services, postage prepaid, addressed to the following counsel of record:

Benjamin J. LaBeau
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For West Law Firm, P.C.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that **Appellant's Opening Brief**, is double spaced, is proportionately spaced 14 point Times New Roman typeface, and contains 9,108 words.


For West Law Firm, P.C.